

ADMINISTRATIVE OFFICE OF THE COURTS

COURTS OF APPEAL BUILDING
ANNAPOLIS, MARYLAND 21401

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SUMMARY OF PROCEEDINGS OF THE MARYLAND CONFERENCE ON JUDICIAL NOMINATING COMMISSIONS

December 16, 1976

(NOTE: Paragraph numbers in this summary do not correspond to numbers on the agenda distributed prior to the meeting, because various matters were taken up in an order different from that set forth in the agenda. Page references are to "the Judicial Nominating Commission Process in Maryland - Background, Development, and Considerations for Change" (October 1976) distributed to all Conference members prior to the Conference.)

1. CALL TO ORDER. The Honorable Alan M. Wilner, the Governor's Chief Legislative Officer, called the Conference to order at 10:00 a.m. on December 16, 1976, at the Reisterstown Plaza Hilton Inn.

Chairman Wilner welcomed the Conference members and discussed some aspects of the judicial appointment process from the viewpoint of the Governor's office.

Chairman Wilner also pointed out that some 36 conferrees were present, representing the judiciary, both Houses of the General Assembly, the Maryland State, Women's, and Federal Bar Associations, 14 County Bar Associations, the Appellate Judicial Nominating Commission, and seven of the eight Trial Court Commissions, the League of Women Voters, and the American Judicature Society. Some 11 of the conference members were lay people. A list of the conferrees is attached to this Summary.

The Conference Secretary, State Court Administrator Adkins, joined Chairman Wilner in welcoming the conference members and outlined briefly some procedural matters.

The Chairman then called for discussion of the matters before the conference.

2. ANNOUNCEMENTS OF VACANCIES. (Page 22).

The agenda proposal was:

That there be no change in notice procedures. If press releases are to be utilized, they should be handled locally by a commission chairperson or member who has access to the local press.

Mr. Dorsey raised some general questions about press releases and their function.

Mr. Sundstrom outlined the excellent press release program utilized by the Fifth Circuit Commission in Howard County. This program has produced good press coverage relating both to functions of the nominating commission and the functions of judges.

Mr. Rosen thought that press releases should be mandatory in order to explain the functions of the commission. Judge Sherbow supported Mr. Rosen in this regard.

Mr. Coates emphasized the need for press releases over and beyond the Daily Record notice, especially in rural areas.

Chairman Wilner pointed out that Court of Appeals Procedural Rule 1 (Appendix C) addressed the question of press releases.

The Secretary noted that the Administrative Office of the Courts lacks contact with local newspapers and also lacks personnel trained in the public information area.

After further discussion, the following proposal was adopted by the conference:

That there be no change in notice procedures. Press releases are to be utilized, and they should be handled locally by a commission chairperson or member designated by the commission.

It was agreed that this proposal will require a change in the Court of Appeals Procedural Rule.

3. RECRUITING (Page 24). The conference adopted the agenda proposal which reads as follows:

That informal recruiting be encouraged.

It was noted that no change in the Executive Order or any other document is required, since the Executive Order presently urges commissioners to "seek ... applications of proposed nominees"

4. NUMBER OF NOMINEES (Page 26). There was some sentiment, expressed mainly by Mr. Rosen, that the maximum number of names to be submitted for any vacancy should be reduced from seven to three, on the grounds that this would produce better qualified persons.

In opposition, it was noted that as a matter of actual fact, commissions seldom if ever submit as many as seven names, and that a maximum of three might be unduly restrictive, especially in the larger jurisdictions.

The conference voted to adopt the agenda proposal, which reads as follows:

That there be no change in maximum limits of names to be submitted for each vacancy.

This will require no change in any document.



5. SCREENING AND VOTING (Page 30). The agenda proposal reads as follows:

That each commission employ those screening and voting procedures with which it is most comfortable, provided:

1. that the secret written ballot requirement is adhered to on the final vote;
2. that members not be required to vote for any specified number of candidates; and
3. that proxy voting be expressly prohibited.

The conference promptly adopted Paragraphs 1 and 2 of the agenda proposal.

There was some discussion as to Paragraph 3. Judge Sherbow pointed out that the Appellate Court Commission has membership from throughout the State; it has utilized proxy voting on a few occasions and finds this valuable as a means of ascertaining the views of all members, even when some of them cannot attend a meeting.

The Secretary observed that so far as he was aware, no commission but the Appellate Commission had utilized proxy voting.

Mr. Dorsey opposed proxy voting. He suggested that a problem of the maintenance of secrecy existed with a proxy vote, that people voting by proxy inevitably lost the benefit of the discussion during the commission meeting, and by the same token, the commission was deprived of the benefit of discussion by the proxy voter, and that proxy voting might work to reduce actual attendance at the commission meetings.

After some further discussion, the conference voted 23 to 2 to adopt Paragraph 3 of the agenda proposal and thus to prohibit proxy voting.

The adoption of Paragraphs 2 and 3 of the agenda proposal will require changes in the Executive Order or the Procedural Regulations, or both.

Mr. Mudd then raised the question of whether commission members who did not attend a specified minimum number of commission meetings should be automatically removed.

The Chairman called attention to Article 41, Section 4 of the Code, which applies to any member of a State Board or Commission appointed by the Governor, and has the effect of removing any such member who fails to attend at least half of the meetings of that Board or Commission during any 12 month period. However, this provision would not apply to nominating commissions, since only some of the commission members are appointed by the Governor. In addition, it would be difficult to apply to nominating commissions meeting at irregular and sometimes infrequent intervals.

It was then proposed that the quorum required for a final vote on a list be raised to ten members; that is, although any name could be placed on the list by vote of a majority of the full authorized membership of the commission (seven) there would have to be at least ten commission members present when that vote was taken, unless all of those present unanimously agreed to proceed with some lesser



number, but no less than a simple majority.

By vote of 15 to 9, the conference agreed that there should be a provision calling for some number higher than a simple majority at the time the final vote is taken.

Mr. Buchanan urged the desirability of a minimum of ten persons and was joined by Mr. Brault in this position.

Mr. Dorsey, however, observed that such a procedure would permit three people to prevent no final vote by a commission, simply by staying away.

Mr. Einbinder noted the problem of the geographically large circuits, in which people might travel many miles only to travel back again for no purpose if three commission members were unable to be present.

A vote was taken, and the conference divided 12 to 12 on the ten person quorum proposal. The Chairman declined to break the tie on the grounds that such an important matter should not be decided by the single vote of the chair.

Mr. Wood thereupon proposed that no final vote of a commission be taken unless at least nine commission members are present at the time, but that nomination still be permitted by vote of at least a majority of the full authorized membership of the commission.

This motion carried.

The Executive Order or the Procedural Regulations or both must be amended to reflect this position.

6. DISQUALIFICATION FOR RELATIONSHIP (Page 32). The agenda proposal;

That Rule 4A be retained in a form no less stringent than its present form.

The proposal was adopted. This will require no change in any document.

The conference then discussed the second agenda proposal on page 32, namely:

That Rule 4A be expanded to apply to close commercial relationships as well as to family and professional legal relationships.

A motion that subsection (a) of Rule 4A be amended to read: "A commission member may not attend or participate in any way in commission deliberations respecting a judicial appointment for which (1) a near relative of the commission member by blood or marriage, or (2) a law partner, LAW OR BUSINESS associate, or employee of the commission member is a candidate" was defeated on a 12 to 13 vote.

It was then suggested that disqualification should be required of a "close and substantial business associate".

Mr. Coates inquired whether disclosure would be a better procedure.

Mr. Alderman suggested that a commission should be entitled to waive disqualification except as to the final vote, thereby obtaining benefit of participation by the member who would otherwise be excluded.



A motion to reconsider the previous vote on Rule 4A in view of the Alderman proposal was defeated.

Delegate Chasnoff suggested that the Canons of Judicial Ethics might be utilized as a standard for disqualification, but this was likewise rejected by the conference.

Mr. Dorsey thereupon proposed the addition of a requirement of disclosure of any substantial close commercial relationship, following which any further participation by the commission member would be determined by the vote of a majority of the commissioners then present.

This proposal was adopted.

Mr. Brault proposed expanding this disclosure to disclosure involving close and substantial personal relationships and political relationships beyond those presently defined in Rule 4A, with further participation following such disclosure to be determined by a majority of the commission as under the Dorsey proposal.

After considerable discussion as to the problems of political relationships, Mr. Brault's proposal was carried by vote of 16 to 12.

Mr. Wood proposed that violation of Rule 4A as expanded should not affect the validity of a list.

This proposal was defeated, however, it was the consensus of the conference that rejection of this proposal did not necessarily imply approval of the converse, but that the effect of a violation of Rule 4A would be left for determination by the appointing authority.

The changes noted above will require modifications of Rule 4A.

7. BAR ASSOCIATION RECOMMENDATIONS (Pages 35 - 36). The agenda proposal is as follows:

That any bar group making recommendations to a commission be requested to adhere to the following guidelines:

1. If the recommendation is based on a poll of bar members, the report to the commission should reveal all questions asked in the poll, and the number of responses (affirmative, negative, or non-response) if applicable, to each question. The report should also show the number of people polled and the number of respondents.

2. If the recommendation is in the form of a committee report or based on a vote of a bar association meeting, it should rate each candidate as "highly qualified," "qualified," "unqualified", or "insufficient information." Criteria for each category should be established. If a committee is involved, the names of the persons attending the meeting should be listed. If an association is involved, the number of persons attending the meeting and the total number of members of the association should be stated. A quorum should be established including a "local" quorum in the case of groups, like the MSBA, having both "general" and "local" members. In either case, the votes for each candidate in each category should be listed by "yea," "nay," and "abstention."

The Conference adopted paragraph 1 of the agenda proposal.

After discussion, the first two sentences of paragraph 2 of the agenda proposal were deleted and the following adopted:

If an association is involved, the number of persons attending the meeting and the total number of members of the association should be stated. A quorum should be established including a "local" quorum in the case of groups, like the MSBA, having both "general" and "local" members. In either case, the votes for each candidate in each category should be listed by "yea," "nay," and "abstention."

These actions of the conference will probably require no changes in either the Executive Order or the procedural rule, although they could be reflected therein. They may require some changes in certain bar association procedures.

At 12:30 p.m. the Conference adjourned for lunch. It reconvened at 1:45 p.m.

8. CONTENT OF PERSONAL DATA QUESTIONNAIRES (Page 51).

After some discussion, the agenda proposal on page 51 was adopted in the following form:

That a standard questionnaire, based on the Third and Eighth Circuit forms, be utilized by all commissions, with added questions dealing with current involvement in litigation as a litigant.

9. MEDICAL AND PSYCHIATRIC HISTORY (Page 53).

The agenda proposal on page 53 suggested the furnishing of detailed information relative to medical and psychiatric history.

A number of members, including Messrs. Dorsey and Moser, opposed this suggestion. Ultimately, the conference adopted the first sentence of the agenda proposal reading as follows:

That the physical/psychiatric questions in the Third/Eighth Circuit questionnaires remain as they are.

These actions can be effected simply by preparation of a standard form questionnaire in the Administrative Office of the Courts.

10. RELEASE OF QUESTIONNAIRES TO BAR ASSOCIATIONS (Page 36).

The agenda proposal was:

That all commissions provide for release of personal data questionnaires to the MSBA Committee, the Bar Association of Baltimore City Committee, and any similar standing committee of an established bar association.

Mr. Dowell suggested that each applicant should be at liberty to furnish copies of his questionnaire to any bar association, but the commission should not be permitted to do so.

Mr. Dorsey thought that no commission should be permitted to release a questionnaire in the absence of a much clearer waiver than now appears on any questionnaire. He also thought that a bar association recipient of the questionnaire should unequivocally commit itself to confidentiality, and that any dissemination permitted should only be to a general member bar association.

Mr. Fossett and Mr. Brault both opposed release of questionnaires, on the ground that a bar association simply could not maintain confidentiality and that a policy of releasing questionnaires would reduce their usefulness, because respondents would tend not to be frank.

Mrs. Cole thought that the role of the bar association was to comment on legal ability, and that bar associations did not need the personal data questionnaire.

Judge Sherbow said that the appellate commission strongly opposed releasing questionnaires to bar associations.

The conference voted to reject the agenda proposal quoted above.

11. RELEASE OF QUESTIONNAIRES TO GOVERNOR (Page 36).

The proposal here is that:

Questionnaires of those on a commission list should also be furnished to the Governor on a routine basis when the list is submitted.

The conference adopted this proposal.

Since neither the Executive Order nor the procedural rules specifically call for confidentiality, it seems that either or both should be amended to reflect the above actions of the conference.

12. CONFIDENTIALITY OF NAMES OF APPLICANTS (Page 39).

The agenda proposal here was:

That present procedures prohibiting general public release of all applicants' names be maintained, with only the names of the actual nominees released to the public.

Chief Judge Sweeney spoke in opposition to the proposal. He thought that the names of all applicants should be made public. He urged that citizens are entitled to know who has applied for a nomination to a judgeship and to comment on his qualifications.

In substitution for the agenda proposal, he moved:

That the names of all applicants be made public prior to action by the commission.

Mr. Meyer argued that this procedure would inhibit applicants. He pointed out that there is presently a problem with obtaining substantial number of applications. Among others, Judge Sherbow, and Messrs. Brault, Dowell, and Sundstrom,

along with Mr. Coates, spoke against this motion.

The motion was defeated with only two votes in the affirmative.

Thereupon the agenda proposal was adopted.

For the reasons stated above with respect to the release of questionnaires matter, it would appear desirable to amend the Executive Order to provide expressly that only the names of the nominees should be released to the public.

13. OBTAINING INFORMATION BEYOND THAT IN THE QUESTIONNAIRE (Page 39).

The agenda proposal was that:

If commissioners are concerned about securing additional background on candidates from sources possibly of greater reliability than the general public, that consideration be given to making routine inquiries to the AGC, selected judges, and, in special cases, to the state police.

Mr. Dorsey urged opposition to this proposal. He said that as matters stand now, a commission can make inquiry of any one it wishes and saw no reason to make a change.

Judge Sweeney thought it was essential to get all information from every possible responsible source. Even if commission members did not wish to obtain views of the public, they should routinely inquire of those with whom the applicant tends to work, namely bar association representatives and the judges before whom he appears. At the very least, he thought that commissions should be encouraged to solicit views from these sources. It certainly should not be forbidden.

Mr. Dowell thought it should be left to the discretion of each commission, but that commissions should be encouraged to gather information.

Judge Sherbow thought that adequate power exists now and that no rule need be made.

Mr. Rosen thought something like the agenda proposal was important, especially from the viewpoint of lay members.

It was thereupon moved that the following be adopted:

A commission may obtain additional background on candidates by making routine inquiries to such agencies as the AGC, judges, and law enforcement agencies, and such other agencies as are appropriate.

This proposal carried by vote of eleven to four.

Mr. Sundstrom thereupon moved that the inquiries contemplated in the above proposal should be made on a confidential basis.

This motion was carried.

It appears that these provisions can be implemented by an amendment to the procedural rules. However, in view of the forthcoming criminal justice information system regulations and rules, it may be necessary to make some appropriate provision in the regulations to be adopted by the Department of Public Safety and Correctional Services and in the general rules of the Court of Appeals.

14. MEETINGS BETWEEN COMMISSIONS AND BAR COMMITTEES REPRESENTATIVES (Page 39).

The agenda proposal here was:

That chairpersons or other representatives of bar committees, when these committees exist, be invited to meet with the appropriate commission to explain the basis for the bar committee action.

Messrs. Moser and Dorsey opposed this suggestion on the basis that it was essentially covered in the preceding proposal.

Mr. Brault thought the suggestion was unnecessary.

Mr. Dowell thought it should be optional if considered at all.

The proposal was rejected.

15. INTERVIEWS (Pages 43-44).

The agenda proposal was:

That a general procedural rule be adopted to encourage the use of interviewing, in the discretion of a commission, as a supplement to other sources of information. The rule should suggest the alternatives of full commission interviews, commission team interviews, or interviews by individual commissioners.

Senator Schweinhaut spoke strongly and eloquently in favor of mandatory interviewing.

Mr. Dorsey, however, thought that interviews were of dubious value. He said the commissions have discretion now and the matter should be left as is. He feared that the adoption of a rule encouraging interviews would eventually develop into a rule mandating interviews.

It was pointed out that so far as known, no commission had ever conducted an interview.

Judge Sherbow thought that interviews served no useful purpose. He suggested that if an effort should be made to interview finalists, everybody would demand an interview. He also thought interviews were demeaning.

Mr. Meyer suggested that interviews might be had on the determination of the chairman and two thirds of the commission members.

Mr. Einbinder supported the concept of interviews. He thought they would help lay members.

Chief Judge Sweeney urged that there should be some interviewing. He said that judges are public servants and should be perfectly willing to submit to interviews.

Mr. Dowell supported interviews by the full commission. If team interviews are used, he thought they should include both lay and lawyer members. He opposed individual commissioner interviews.

Mr. Coates said that in the first circuit, if members don't know candidates, they go to see the candidates.

Mr. Fossett supported the concept of interviews.

Mr. Brault favored the agenda proposal, but not mandatory interviews. He also thought that team interviews would work more effectively than full commission interviews.

Mrs. Cole also supported the concept of interviews. She thought that they should be by the full commission or at least a substantial portion of the commission.

Mr. Axley thereupon moved the following:

That a general procedural rule be adopted to encourage the use of interviewing, in the discretion of a commission, as a supplement to other sources of information. The rule should suggest the alternatives of full commission interviews or commission team interviews.

A motion was adopted by a vote of 22 to 6.

This action will require modifications of general Rule 3 and possibly of Rule 2 with respect to time factors.

16. COMMISSION CHAIRPERSON (Page 10).

The conference adopted the proposal:

That gubernatorial appointment of the chairperson be retained.

This will require no change in any document.

17. COMMISSION VICE CHAIRPERSON (Page 50).

The secretary pointed out that sometimes a commission chairperson position remains vacant for a considerable period, in which event there is no ready mechanism for communication with the commission or for action by the commission.

After discussion, the conference adopted the following motion:

That the rules be amended to require each commission to elect a vice-chairperson by vote of a majority of the full authorized membership of the commission; the vice-chairperson to have the authority to perform all duties of the chairperson in the latter's absence.

While this might be accomplished by rule modification, it is a matter of basic commission structure and would more properly be included in the Executive Order.

18. COMMISSION COMPOSITION (Page 13).

The conference adopted the agenda proposal as follows:

That commission composition remain unchanged.

This will require no change in any document.

19. ELECTION OF LAWYER MEMBERS (Page 14).

The conference adopted the following agenda proposal:

That the lawyer-election process be retained.

This will require no change in any document.

20. GEOGRAPHICAL ELIGIBILITY FOR LAWYER MEMBERS (Page 18).

The agenda proposal here was:

That there be no change in the 1974 Executive Order's geographical eligibility requirements for lawyer members of appellate court commissions; with respect to trial court commissions and to both voter eligibility and eligibility to serve, that both the 1974 Executive Order and the selection regulations (Paragraphs 9 and 10) be amended to require explicitly both residence and principal office within the circuit.

There was no dispute as to provisions pertaining to the appellate commission. As to trial court commissions, Mr. Dorsey moved adoption of the agenda proposal.

The motion was defeated.

Mr. Mudd moved that the Executive Order be made consistent with the selection regulations, and that maintenance of principal office within the circuit would be the basic eligibility requirement.

The motion was carried.

This will require amendment of the Executive Order and possibly some clarification of the selection regulations.

20. APPOINTMENT OF LAWYER MEMBERS TO INITIAL VACANCIES WHEN THERE HAS NOT BEEN A LAWYER ELECTION (Page 19).

The agenda proposal was adopted. It reads:

That the selection regulations be amended to require that if there is no nominee from any county in a circuit, the court fill the vacancy on a trial court commission by appointing a lawyer from that county, if practical.

This will require a modification of the selection regulations.

21. DISQUALIFICATION FROM MEMBERSHIP (Page 20).

The conference agreed that the 1974 Executive Order and the selection regulations should be amended to provide uniform disqualifications making certain categories of person ineligible for commission membership. As to what those categories should be, the following actions were taken:

- a. Any elected public official (federal, state, county, or municipal) should be excluded.
- b. Any employee in the office or department of such an official, whether full-time or part-time, should not be excluded by vote of ten to eight. It was noted that this broad exclusion might exclude many school teachers (employees of elected boards of education) and a great many other relatively low level and non-policy making employees, although it was also urged that to maintain the integrity of the commission, these persons all should be excluded.
- c. By vote of 15 to 6, the conference decided that any full-time government employee, (federal, state, bi-county, multi-county, county, or municipal) should be excluded.
- d. As to exclusion of appointed public officials who receive compensation, whether full-time or part-time, and employees of all those officials, there was a feeling that this exclusion was too broad and that it might exclude literally thousands of citizens, some of whom should not be excluded.

After considerable further debate about exclusions from commission membership, problems of political and gubernatorial influence, and the like, Mr. Axley moved that the entire matter of disqualification be deferred; and that it be considered at a subsequent meeting of the conference.

The motion was carried and the conference secretary was directed to attempt to prepare an appropriate draft and circulate it among the conference members.

22. ELECTION OF CIRCUIT COURT/SUPREME BENCH JUDGES

Judge Sherbow pointed out that a constitutional amendment adopted on November 2, 1976, had done much to remove the selection and retention of appellate court judges from the political process and to establish merit selection procedures for them. He noted that this circumstance already existed with respect to judges of the District Court, and that the only court level in which judges were exposed to the hazards of normal political elections were at the circuit court and Supreme Bench level. He thereupon moved the following resolution:

We urge the General Assembly to enact a bill to submit a constitutional amendment to the voters of Maryland applicable to the circuit courts of the counties and the Supreme Bench of Baltimore City to provide for the selection, appointment and retention of the judges of these courts in the same manner as now provided for the judges of the appellate courts of this state.

Mr. Meyer and others supported this resolution which was adopted without audible or visible dissent.

The conference secretary was directed to provide for release of the resolution to the press at the appropriate time.

23. ADJOURNMENT

Mr. Wilner stated that the time for adjournment had now arrived. He complimented the conference members for the high quality of discussion and for the thoroughness with which they had considered the matters before them.

He observed that a few items on the agenda had not been reached and that some decisions of the conference required further action. He therefore proposed that the conference be reconvened, perhaps in the summer or early fall of 1977, for the purpose of concluding its work.

In the meantime, he stated that the conference secretary would prepare and circulate to the members a summary of the proceedings of the conference and that recommendations reflecting the conference decisions would be forwarded to the Governor and Chief Judge for such action as each might deem appropriate.

The conference was thereupon adjourned at 4:40 p.m.

Respectfully submitted,



William H. Adkins, II
State Court Administrator

JUDICIAL NOMINATING COMMISSION CONFERENCE
December 16, 1976

Bruce Alderman
Thomas Axley
Dale E. Balfour
Albert D. Brault
John A. Buchanan
Joel Chasnoff
Raymond Coates, Sr.
Gloria Cole
Roy D. Cromwell
Virginia Davis
William R. Dorsey
J. Carson Dowell
Irving M. Einbinder
Clarence L. Fossett, Jr.
Robert H. Heller
Isadore Jacobsen
Mary W. Johnson
Marker J. Lovell
Dr. Joseph H. McLain
Marshall M. Meyer
M. Peter Moser
Thomas Mudd
Norwood B. Orrick
Nathan Patz
Alfred Petersam
Rosalie Riley
J. Russell Robinson
Herbert L. Rollins
Odell Rosen
Margaret Schweinhaut
Joseph Sherbow
Robert Skutch
John Sundstrom
Robert F. Sweeney
Patrick Thompson
Timothy Welsh
Alan M. Wilner
Howard Wood

Baltimore County Bar Association
Calvert County Bar Association
League of Women Voters
Sixth Circuit Nominating Commission
Seventh Circuit Nominating Commission
Representative, House of Delegates
Worcester County Bar Association
American Judicature Society
Fifth Circuit Nominating Commission
Third Circuit Nominating Commission
Eighth Circuit Nominating Commission
Fourth Circuit Nominating Commission
Fourth Circuit Nominating Commission
Prince George's County Bar Association
Anne Arundel County Bar Association
Sixth Circuit Nominating Commission
Women's Bar Association of Maryland
Carroll County Bar Association
Second Circuit Nominating Commission
Eighth Circuit Nominating Commission
Maryland State Bar Association
Charles County Bar Association
Maryland State Bar Association
Baltimore City Bar Association
Federal Bar Association, Baltimore Chapter
Sixth Circuit Nominating Commission
Washington County Bar Association
Frederick County Bar Association
Appellate Nominating Commission
Senate of Maryland
Appellate Nominating Commission
Third Circuit Nominating Commission
Fifth Circuit Nominating Commission
District Court of Maryland
Queen Anne's County Bar Association
Howard County Bar Association
Governor's Office, Chairman of Conference
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Md. JU 9.2.1. B. 11/11/76
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Mr. Dorsey opposed proxy voting. He suggested that a problem of the maintenance of secrecy existed with a proxy vote, that people voting by proxy inevitably lost the benefit of the discussion during the commission meeting, and by the same token, the commission was deprived of the benefit of discussion by the proxy voter, and that proxy voting might work to reduce actual attendance at the commission meetings.

After some further discussion, the conference voted 23 to 2 to adopt Paragraph 3 of the agenda proposal and thus to prohibit proxy voting.

The adoption of Paragraphs 2 and 3 of the agenda proposal will require changes in the Executive Order or the Procedural Regulations, or both.

Mr. Mudd then raised the question of whether commission members who did not attend a specified minimum number of commission meetings should be automatically removed.

The Chairman called attention to Article 41, Section 4 of the Code, which applies to any member of a State Board or Commission appointed by the Governor, and has the effect of removing any such member who fails to attend at least half of the meetings of that Board or Commission during any 12 month period. However, this provision would not apply to nominating commissions, since only some of the commission members are appointed by the Governor. In addition, it would be difficult to apply to nominating commissions meeting at irregular and sometimes infrequent intervals.

It was then proposed that the quorum required for a final vote on a list be raised to ten members; that is, although any name could be placed on the list by vote of a majority of the full authorized membership of the commission (seven) there would have to be at least ten commission members present when that vote was taken, unless all of those present unanimously agreed to proceed with some lesser

number, but no less than a simple majority.

By vote of 15 to 9, the conference agreed that there should be a provision calling for some number higher than a simple majority at the time the final vote is taken.

Mr. Buchanan urged the desirability of a minimum of ten persons and was joined by Mr. Brault in this position.

Mr. Dorsey, however, observed that such a procedure would permit three people to prevent no final vote by a commission, simply by staying away.

Mr. Einbinder noted the problem of the geographically large circuits, in which people might travel many miles only to travel back again for no purpose if three commission members were unable to be present.

A vote was taken, and the conference divided 12 to 12 on the ten person quorum proposal. The Chairman declined to break the tie on the grounds that such an important matter should not be decided by the single vote of the chair.

Mr. Wood thereupon proposed that no final vote of a commission be taken unless at least nine commission members are present at the time, but that nomination still be permitted by vote of at least a majority of the full authorized membership of the commission.

This motion carried.

The Executive Order or the Procedural Regulations or both must be amended to reflect this position.

6. DISQUALIFICATION FOR RELATIONSHIP (Page 32). The agenda proposal;

That Rule 4A be retained in a form no less stringent than its present form.

The proposal was adopted. This will require no change in any document.

The conference then discussed the second agenda proposal on page 32, namely:

That Rule 4A be expanded to apply to close commercial relationships as well as to family and professional legal relationships.

A motion that subsection (a) of Rule 4A be amended to read: "A commission member may not attend or participate in any way in commission deliberations respecting a judicial appointment for which (1) a near relative of the commission member by blood or marriage, or (2) a law partner, LAW OR BUSINESS associate, or employee of the commission member is a candidate" was defeated on a 12 to 13 vote.

It was then suggested that disqualification should be required of a "close and substantial business associate".

Mr. Coates inquired whether disclosure would be a better procedure.

Mr. Alderman suggested that a commission should be entitled to waive disqualification except as to the final vote, thereby obtaining benefit of participation by the member who would otherwise be excluded.

A motion to reconsider the previous vote on Rule 4A in view of the Alderman proposal was defeated.

Delegate Chasnoff suggested that the Canons of Judicial Ethics might be utilized as a standard for disqualification, but this was likewise rejected by the conference.

Mr. Dorsey thereupon proposed the addition of a requirement of disclosure of any substantial close commercial relationship, following which any further participation by the commission member would be determined by the vote of a majority of the commissioners then present.

This proposal was adopted.

Mr. Brault proposed expanding this disclosure to disclosure involving close and substantial personal relationships and political relationships beyond those presently defined in Rule 4A, with further participation following such disclosure to be determined by a majority of the commission as under the Dorsey proposal.

After considerable discussion as to the problems of political relationships, Mr. Brault's proposal was carried by vote of 16 to 12.

Mr. Wood proposed that violation of Rule 4A as expanded should not affect the validity of a list.

This proposal was defeated, however, it was the consensus of the conference that rejection of this proposal did not necessarily imply approval of the converse, but that the effect of a violation of Rule 4A would be left for determination by the appointing authority.

The changes noted above will require modifications of Rule 4A.

7. BAR ASSOCIATION RECOMMENDATIONS (Pages 35 - 36). The agenda proposal is as follows:

That any bar group making recommendations to a commission be requested to adhere to the following guidelines:

1. If the recommendation is based on a poll of bar members, the report to the commission should reveal all questions asked in the poll, and the number of responses (affirmative, negative, or non-response) if applicable, to each question. The report should also show the number of people polled and the number of respondents.
2. If the recommendation is in the form of a committee report or based on a vote of a bar association meeting, it should rate each candidate as "highly qualified," "qualified," "unqualified", or "insufficient information." Criteria for each category should be established. If a committee is involved, the names of the persons attending the meeting should be listed. If an association is involved, the number of persons attending the meeting and the total number of members of the association should be stated. A quorum should be established including a "local" quorum in the case of groups, like the MSBA, having both "general" and "local" members. In either case, the votes for each candidate in each category should be listed by "yea," "nay," and "abstention."

The Conference adopted paragraph 1 of the agenda proposal.

After discussion, the first two sentences of paragraph 2 of the agenda proposal were deleted and the following adopted:

If an association is involved, the number of persons attending the meeting and the total number of members of the association should be stated. A quorum should be established including a "local" quorum in the case of groups, like the MSBA, having both "general" and "local" members. In either case, the votes for each candidate in each category should be listed by "yea," "nay," and "abstention."

These actions of the conference will probably require no changes in either the Executive Order or the procedural rule, although they could be reflected therein. They may require some changes in certain bar association procedures.

At 12:30 p.m. the Conference adjourned for lunch. It reconvened at 1:45 p.m.

8. CONTENT OF PERSONAL DATA QUESTIONNAIRES (Page 51).

After some discussion, the agenda proposal on page 51 was adopted in the following form:

That a standard questionnaire, based on the Third and Eighth Circuit forms, be utilized by all commissions, with added questions dealing with current involvement in litigation as a litigant.

9. MEDICAL AND PSYCHIATRIC HISTORY (Page 53).

The agenda proposal on page 53 suggested the furnishing of detailed information relative to medical and psychiatric history.

A number of members, including Messrs. Dorsey and Moser, opposed this suggestion. Ultimately, the conference adopted the first sentence of the agenda proposal reading as follows:

That the physical/psychiatric questions in the Third/Eighth Circuit questionnaires remain as they are.

These actions can be effected simply by preparation of a standard form questionnaire in the Administrative Office of the Courts.

10. RELEASE OF QUESTIONNAIRES TO BAR ASSOCIATIONS (Page 36).

The agenda proposal was:

That all commissions provide for release of personal data questionnaires to the MSBA Committee, the Bar Association of Baltimore City Committee, and any similar standing committee of an established bar association.

Mr. Dowell suggested that each applicant should be at liberty to furnish copies of his questionnaire to any bar association, but the commission should not be permitted to do so.

Mr. Dorsey thought that no commission should be permitted to release a questionnaire in the absence of a much clearer waiver than now appears on any questionnaire. He also thought that a bar association recipient of the questionnaire should unequivocally commit itself to confidentiality, and that any dissemination permitted should only be to a general member bar association.

Mr. Fossett and Mr. Brault both opposed release of questionnaires, on the ground that a bar association simply could not maintain confidentiality and that a policy of releasing questionnaires would reduce their usefulness, because respondents would tend not to be frank.

Mrs. Cole thought that the role of the bar association was to comment on legal ability, and that bar associations did not need the personal data questionnaire.

Judge Sherbow said that the appellate commission strongly opposed releasing questionnaires to bar associations.

The conference voted to reject the agenda proposal quoted above.

11. RELEASE OF QUESTIONNAIRES TO GOVERNOR (Page 36).

The proposal here is that:

Questionnaires of those on a commission list should also be furnished to the Governor on a routine basis when the list is submitted.

The conference adopted this proposal.

Since neither the Executive Order nor the procedural rules specifically call for confidentiality, it seems that either or both should be amended to reflect the above actions of the conference.

12. CONFIDENTIALITY OF NAMES OF APPLICANTS (Page 39).

The agenda proposal here was:

That present procedures prohibiting general public release of all applicants' names be maintained, with only the names of the actual nominees released to the public.

Chief Judge Sweeney spoke in opposition to the proposal. He thought that the names of all applicants should be made public. He urged that citizens are entitled to know who has applied for a nomination to a judgeship and to comment on his qualifications.

In substitution for the agenda proposal, he moved:

That the names of all applicants be made public prior to action by the commission.

Mr. Meyer argued that this procedure would inhibit applicants. He pointed out that there is presently a problem with obtaining substantial number of applications. Among others, Judge Sherbow, and Messrs. Brault, Dowell, and Sundstrom,

along with Mr. Coates, spoke against this motion.

The motion was defeated with only two votes in the affirmative.

Thereupon the agenda proposal was adopted.

For the reasons stated above with respect to the release of questionnaires matter, it would appear desirable to amend the Executive Order to provide expressly that only the names of the nominees should be released to the public.

13. OBTAINING INFORMATION BEYOND THAT IN THE QUESTIONNAIRE (Page 39).

The agenda proposal was that:

If commissioners are concerned about securing additional background on candidates from sources possibly of greater reliability than the general public, that consideration be given to making routine inquiries to the AGC, selected judges, and, in special cases, to the state police.

Mr. Dorsey urged opposition to this proposal. He said that as matters stand now, a commission can make inquiry of any one it wishes and saw no reason to make a change.

Judge Sweeney thought it was essential to get all information from every possible responsible source. Even if commission members did not wish to obtain views of the public, they should routinely inquire of those with whom the applicant tends to work, namely bar association representatives and the judges before whom he appears. At the very least, he thought that commissions should be encouraged to solicit views from these sources. It certainly should not be forbidden.

Mr. Dowell thought it should be left to the discretion of each commission, but that commissions should be encouraged to gather information.

Judge Sherbow thought that adequate power exists now and that no rule need be made.

Mr. Rosen thought something like the agenda proposal was important, especially from the viewpoint of lay members.

It was thereupon moved that the following be adopted:

A commission may obtain additional background on candidates by making routine inquiries to such agencies as the AGC, judges, and law enforcement agencies, and such other agencies as are appropriate.

This proposal carried by vote of eleven to four.

Mr. Sundstrom thereupon moved that the inquiries contemplated in the above proposal should be made on a confidential basis.

This motion was carried.

It appears that these provisions can be implemented by an amendment to the procedural rules. However, in view of the forthcoming criminal justice information system regulations and rules, it may be necessary to make some appropriate provision in the regulations to be adopted by the Department of Public Safety and Correctional Services and in the general rules of the Court of Appeals.

14. MEETINGS BETWEEN COMMISSIONS AND BAR COMMITTEES REPRESENTATIVES (Page 39).

The agenda proposal here was:

That chairpersons or other representatives of bar committees, when these committees exist, be invited to meet with the appropriate commission to explain the basis for the bar committee action.

Messrs. Moser and Dorsey opposed this suggestion on the basis that it was essentially covered in the preceding proposal.

Mr. Brault thought the suggestion was unnecessary.

Mr. Dowell thought it should be optional if considered at all.

The proposal was rejected.

15. INTERVIEWS (Pages 43-44).

The agenda proposal was:

That a general procedural rule be adopted to encourage the use of interviewing, in the discretion of a commission, as a supplement to other sources of information. The rule should suggest the alternatives of full commission interviews, commission team interviews, or interviews by individual commissioners.

Senator Schweinhaut spoke strongly and eloquently in favor of mandatory interviewing.

Mr. Dorsey, however, thought that interviews were of dubious value. He said the commissions have discretion now and the matter should be left as is. He feared that the adoption of a rule encouraging interviews would eventually develop into a rule mandating interviews.

It was pointed out that so far as known, no commission had ever conducted an interview.

Judge Sherbow thought that interviews served no useful purpose. He suggested that if an effort should be made to interview finalists, everybody would demand an interview. He also thought interviews were demeaning.

Mr. Meyer suggested that interviews might be had on the determination of the chairman and two thirds of the commission members.

Mr. Einbinder supported the concept of interviews. He thought they would help lay members.

Chief Judge Sweeney urged that there should be some interviewing. He said that judges are public servants and should be perfectly willing to submit to interviews.

Mr. Dowell supported interviews by the full commission. If team interviews are used, he thought they should include both lay and lawyer members. He opposed individual commissioner interviews.

Mr. Coates said that in the first circuit, if members don't know candidates, they go to see the candidates.

Mr. Fossett supported the concept of interviews.

Mr. Brault favored the agenda proposal, but not mandatory interviews. He also thought that team interviews would work more effectively than full commission interviews.

Mrs. Cole also supported the concept of interviews. She thought that they should be by the full commission or at least a substantial portion of the commission.

Mr. Axley thereupon moved the following:

That a general procedural rule be adopted to encourage the use of interviewing, in the discretion of a commission, as a supplement to other sources of information. The rule should suggest the alternatives of full commission interviews or commission team interviews.

A motion was adopted by a vote of 22 to 6.

This action will require modifications of general Rule 3 and possibly of Rule 2 with respect to time factors.

16. COMMISSION CHAIRPERSON (Page 10).

The conference adopted the proposal:

That gubernatorial appointment of the chairperson be retained.

This will require no change in any document.

17. COMMISSION VICE CHAIRPERSON (Page 50).

The secretary pointed out that sometimes a commission chairperson position remains vacant for a considerable period, in which event there is no ready mechanism for communication with the commission or for action by the commission.

After discussion, the conference adopted the following motion:

That the rules be amended to require each commission to elect a vice-chairperson by vote of a majority of the full authorized membership of the commission; the vice-chairperson to have the authority to perform all duties of the chairperson in the latter's absence.

While this might be accomplished by rule modification, it is a matter of basic commission structure and would more properly be included in the Executive Order.

18. COMMISSION COMPOSITION (Page 13).

The conference adopted the agenda proposal as follows:

That commission composition remain unchanged.

This will require no change in any document.

19. ELECTION OF LAWYER MEMBERS (Page 14).

The conference adopted the following agenda proposal:

That the lawyer-election process be retained.

This will require no change in any document.

20. GEOGRAPHICAL ELIGIBILITY FOR LAWYER MEMBERS (Page 18).

The agenda proposal here was:

That there be no change in the 1974 Executive Order's geographical eligibility requirements for lawyer members of appellate court commissions; with respect to trial court commissions and to both voter eligibility and eligibility to serve, that both the 1974 Executive Order and the selection regulations (Paragraphs 9 and 10) be amended to require explicitly both residence and principal office within the circuit.

There was no dispute as to provisions pertaining to the appellate commission. As to trial court commissions, Mr. Dorsey moved adoption of the agenda proposal.

The motion was defeated.

Mr. Mudd moved that the Executive Order be made consistent with the selection regulations, and that maintenance of principal office within the circuit would be the basic eligibility requirement.

The motion was carried.

This will require amendment of the Executive Order and possibly some clarification of the selection regulations.

20. APPOINTMENT OF LAWYER MEMBERS TO INITIAL VACANCIES WHEN THERE HAS NOT BEEN A LAWYER ELECTION (Page 19).

The agenda proposal was adopted. It reads:

That the selection regulations be amended to require that if there is no nominee from any county in a circuit, the court fill the vacancy on a trial court commission by appointing a lawyer from that county, if practical.

This will require a modification of the selection regulations.

21. DISQUALIFICATION FROM MEMBERSHIP (Page 20).

The conference agreed that the 1974 Executive Order and the selection regulations should be amended to provide uniform disqualifications making certain categories of person ineligible for commission membership. As to what those categories should be, the following actions were taken:

- a. Any elected public official (federal, state, county, or municipal) should be excluded.
- b. Any employee in the office or department of such an official, whether full-time or part-time, should not be excluded by vote of ten to eight. It was noted that this broad exclusion might exclude many school teachers (employees of elected boards of education) and a great many other relatively low level and non-policy making employees, although it was also urged that to maintain the integrity of the commission, these persons all should be excluded.
- c. By vote of 15 to 6, the conference decided that any full-time government employee, (federal, state, bi-county, multi-county, county, or municipal) should be excluded.
- d. As to exclusion of appointed public officials who receive compensation, whether full-time or part-time, and employees of all those officials, there was a feeling that this exclusion was too broad and that it might exclude literally thousands of citizens, some of whom should not be excluded.

After considerable further debate about exclusions from commission membership, problems of political and gubernatorial influence, and the like, Mr. Axley moved that the entire matter of disqualification be deferred; and that it be considered at a subsequent meeting of the conference.

The motion was carried and the conference secretary was directed to attempt to prepare an appropriate draft and circulate it among the conference members.

22. ELECTION OF CIRCUIT COURT/SUPREME BENCH JUDGES

Judge Sherbow pointed out that a constitutional amendment adopted on November 2, 1976, had done much to remove the selection and retention of appellate court judges from the political process and to establish merit selection procedures for them. He noted that this circumstance already existed with respect to judges of the District Court, and that the only court level in which judges were exposed to the hazards of normal political elections were at the circuit court and Supreme Bench level. He thereupon moved the following resolution:

We urge the General Assembly to enact a bill to submit a constitutional amendment to the voters of Maryland applicable to the circuit courts of the counties and the Supreme Bench of Baltimore City to provide for the selection, appointment and retention of the judges of these courts in the same manner as now provided for the judges of the appellate courts of this state.

Mr. Meyer and others supported this resolution which was adopted without audible or visible dissent.

The conference secretary was directed to provide for release of the resolution to the press at the appropriate time.

23. ADJOURNMENT

Mr. Wilner stated that the time for adjournment had now arrived. He complimented the conference members for the high quality of discussion and for the thoroughness with which they had considered the matters before them.

He observed that a few items on the agenda had not been reached and that some decisions of the conference required further action. He therefore proposed that the conference be reconvened, perhaps in the summer or early fall of 1977, for the purpose of concluding its work.

In the meantime, he stated that the conference secretary would prepare and circulate to the members a summary of the proceedings of the conference and that recommendations reflecting the conference decisions would be forwarded to the Governor and Chief Judge for such action as each might deem appropriate.

The conference was thereupon adjourned at 4:40 p.m.

Respectfully submitted,



William H. Adkins, II
State Court Administrator

JUDICIAL NOMINATING COMMISSION CONFERENCE
December 16, 1976

Bruce Alderman
Thomas Axley
Dale E. Balfour
Albert D. Brault
John A. Buchanan
Joel Chasnoff
Raymond Coates, Sr.
Gloria Cole
Roy D. Cromwell
Virginia Davis
William R. Dorsey
J. Carson Dowell
Irving M. Einbinder
Clarence L. Fossett, Jr.
Robert H. Heller
Isadore Jacobsen
Mary W. Johnson
Marker J. Lovell
Dr. Joseph H. McLain
Marshall M. Meyer
M. Peter Moser
Thomas Mudd
Norwood B. Orrick
Nathan Patz
Alfred Petersam
Rosalie Riley
J. Russell Robinson
Herbert L. Rollins
Odell Rosen
Margaret Schweinhaut
Joseph Sherbow
Robert Skutch
John Sundstrom
Robert F. Sweeney
Patrick Thompson
Timothy Welsh
Alan M. Wilner
Howard Wood

Baltimore County Bar Association
Calvert County Bar Association
League of Women Voters
Sixth Circuit Nominating Commission
Seventh Circuit Nominating Commission
Representative, House of Delegates
Worcester County Bar Association
American Judicature Society
Fifth Circuit Nominating Commission
Third Circuit Nominating Commission
Eighth Circuit Nominating Commission
Fourth Circuit Nominating Commission
Fourth Circuit Nominating Commission
Prince George's County Bar Association
Anne Arundel County Bar Association
Sixth Circuit Nominating Commission
Women's Bar Association of Maryland
Carroll County Bar Association
Second Circuit Nominating Commission
Eighth Circuit Nominating Commission
Maryland State Bar Association
Charles County Bar Association
Maryland State Bar Association
Baltimore City Bar Association
Federal Bar Association, Baltimore Chapter
Sixth Circuit Nominating Commission
Washington County Bar Association
Frederick County Bar Association
Appellate Nominating Commission
Senate of Maryland
Appellate Nominating Commission
Third Circuit Nominating Commission
Fifth Circuit Nominating Commission
District Court of Maryland
Queen Anne's County Bar Association
Howard County Bar Association
Governor's Office, Chairman of Conference
Second Circuit Nominating Commission

